Supreme Court, U.S.
FILED
SEP 27 2002
OFFICE OF THE CLERK

No. 02-200

In the Supreme Court of the United States

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING AND CHRISTOPHER SMITH,

Appellants,

v

CANDICE S. MILLER, CHRISTOPHER M.THOMAS, THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, AND JAMES L. PALASKE,

Appellees.

STATE APPELLEES', MICHIGAN SECRETARY OF STATE CANDICE MILLER AND DIRECTOR OF ELECTIONS CHRISTOPHER THOMAS, MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction under 28 USC §1253 to review a grant of summary disposition, upholding the constitutionality of Michigan's 2001 Congressional Districting Plan, which is not an "order granting or denying . . . an interlocutory or permanent injunction."

2. Whether Appellants' allegation that the 2001 Congressional Districting Plan will deny them proportional representation fails to state an actionable claim of unconstitutional partisan gerrymandering because this Court in *Davis v Bandemer*, 478 US 109 (1986) clearly held that the Equal Protection Clause of the Fourteenth Amendment does not entitle political parties to proportional representation.

3. Whether Appellants otherwise fail to state an actionable claim of unconstitutional partisan gerrymandering under the Equal Protection Clause where they have not alleged facts that establish that the 2001 Congressional Districting Plan will subject them to an unconstitutional discriminatory effect, but instead have pleaded facts that preclude them from making that requisite showing.

4. Whether Appellants' argument to extend the lower standard for racial gerrymandering claims articulated in *Shaw v Reno*, 509 US 630 (1993) (*Shaw I*) to partisan gerrymandering claims disconnects that ruling from its factual and legal foundation and thus was properly dismissed by the District Court.

5. Whether Appellants' US Const, art 1, § 4 claim represents a fundamental misconstruction of the Elections Clause, the dismissal of which should be summarily affirmed by this Court.

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INTRODUCTION

Pursuant to Supreme Court Rule 18.6, Candice S. Miller, Secretary of State for the State of Michigan and Christopher M. Thomas, Director of the Bureau of Elections for the State of Michigan, (State Appellees herein and Defendants below), move to dismiss this appeal for lack of jurisdiction or, in the alternative, to summarily affirm the order below because the questions presented by Appellants for review are so insubstantial as to require no further briefing or oral argument.

STATEMENT OF THE CASE

A. Facts Relevant to this Motion.[1]

As a result of the 2000 census Michigan lost one congressional seat. The State redrew its congressional districts, reducing the number of districts from 16 to 15. 2001 Congressional Districting Plan ("2001 Plan"), 2001 PA 115; MCL 3.51-3.55. The population of districts 1-9 and 11-15 is 662,563 and the population of district 10 is 662,562. MCL 3.54(e)(i).

In enacting the 2001 Plan, as indicated in § 4(a) of the act, the Legislature followed the neutral redistricting principles it had previously set forth in § 3 of the 1999 Congressional Redistricting Act, MCL 3.63. *See*, MCL 3.54(a) (stating the Legislature's intention to comply fully with those criteria). These criteria include that districts be contiguous and break as few county and municipal boundaries as is reasonably possible. MCL 3.63(c). In a concurrent resolution submitted to the Governor with the enacted plan, the Legislature explained that "[t]his is the plan which is most in compliance with the statutory redistricting criteria, constitutional, and statutory requirements of any plan before the Legislature." House Concurrent Resolution 34, 2001 Journal of the Senate 1218 (No. 58, July 11, 2001).

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[1] Due to the Appellants' many mischaracterizations of the facts, as well as blatantly erroneous statements, it is necessary for the State Appellees to present a somewhat more detailed statement of facts than otherwise would be necessary. At the outset, it must be noted that the decision below was one made on the pleadings, so while the lower court was required to assume facts as pleaded, there were no factual findings made below. Notwithstanding that procedural posture, Appellants misleadingly assert that statistical and expert analyses confirm and verify that which has merely been alleged. *See e.g.*, JS at 4. Further examples of the liberties that Appellants have taken with the record will be highlighted in the following statement of facts.

After passage of the act by the Legislature and adjournment for the summer, it was discovered that in the 41 pages of legal descriptions consisting of census block and tract numbers, two tracts, 416200 and 422900, were inadvertently left out of the legal description of District 15. *Leroux v Miller,* 465 Mich 594, 604 (2002).[2] The two tracts represented 4,578 people. *Id.* Without these two tracts, district 15 would have a population of 657,985. *Id.* at 607-08. Section 4(e)(i) of the act states, however, that the Legislature assigned 662,563 people to District 15. MCL 3.54(e)(i). Accordingly, Secretary of the Senate Carol Viventi, in exercise of authority granted to her by the Legislature pursuant to Rule 12 of the Joint Rules of the Senate and House of Representatives, included these two tracts in the final draft, thereby correcting the inconsistency and reflecting the clear intent of the Legislature. *Id.* at 608, 612, 614.

In *Leroux,* the Michigan Supreme Court upheld the 2001 Plan as validly enacted under the Michigan Constitution and rejected claims that the plan should be stricken under the 1999 Congressional Redistricting Act.[3] Consequently, Appellants' assertion that the 2001 Plan violates state law by

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[2] Appellants' counsel represented the plaintiffs in this state law challenge to the 2001 Plan.

[3] Appellants' reliance on the District Court's statement that the enactment of the 2001 Plan was "marked by a host of procedural defects'" (JS at 6) and their assertion that "the bill passed by the Legislature . . . differed from the bill signed by the Governor" (JS at 7) brazenly disregards the unequivocal rulings by the Michigan Supreme Court rejecting those allegations. In *Leroux,* the Court held that the Secretary of the Senate's actions "implemented the clear intent of the Legislature" and that the enactment of the 2001 plan was constitutionally valid. 465 Mich at 596, 614. Additionally, Appellants misinform this Court by asserting that the Michigan Supreme Court "divided along partisan lines" to uphold the validity of the 2001 Plan. JS at 7. Only one Justice, Justice Kelly, dissented in that decision; the other Justice nominated by the Democratic Party, Justice Cavanagh, concurred with the majority.

not complying with the 1999 Congressional Redistricting Act is patently incorrect. *See* Jurisdictional Statement (JS) at 5.[4]

While the Legislature was not bound by the criteria set forth in the 1999 Congressional Redistricting Act, the Legislature nonetheless followed those criteria. No other plan introduced at the time the Legislature redistricted the State's congressional districts had fewer breaks of county and municipal boundaries. Appellants misleadingly argue that Democrats introduced a second alternative plan that better met the non-binding criteria followed by the Legislature. JS at 5. Appellants fail to note, however, that "the second alternative plan" was introduced in October 2001 – three months after the Legislature had enacted the 2001 Plan and one month after the Governor had signed it into law. At that time, the Legislature had moved on to address other pressing legislative matters such as the budget.

B. Procedural History and Decision Below

On May 24, 2002, the District Court dismissed Appellants' first amended complaint. While the District Court dismissed the bulk of that complaint with prejudice, it allowed Appellants 30 days to file a second amended complaint stating a claim of unconstitutional partisan gerrymandering under *Davis v Bandemer*, 478 US 109 (1986). The June 5, 2002 order appealed herein is the District Court's dismissal of Appellants' Second Amended Complaint. JS App at 20a-22a. That order neither grants nor denies injunctive relief.

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[4] Similarly, Appellants erroneously imply that the Michigan Supreme Court held that the criteria in the 1999 Congressional Redistricting Act were reenacted in 2001. JS at 6. In *Leroux*, however, the Court expressly rejected that argument, holding: "§4(a) [of PA 115] does not incorporate the 1999 guidelines as an enforceable provision of 2001 PA 115 . . . . [r]ather, §4(a) is merely part of the Legislature's explanation of the principles it used in developing the plan." *Leroux*, 465 Mich at 617.

In dismissing Appellants' equal protection claim, the District Court analyzed the three elements required by this Court in *Bandemer*, properly holding "that to prevail on a valid partisan gerrymandering claim the plaintiff must prove '[1] intentional discrimination [2] against an identifiable political group and [3] an actual discriminatory effect on that group.'" JS App at 5a (quoting *Bandemer*, 478 US at 127) (brackets added by District Court). *See also* 478 US at 161 (Powell, J., dissenting) (agreeing that these are the required proofs). Appellants' failure to establish the third element, an actual discriminatory effect, is the basis of the District Court's dismissal of this claim.

The District Court held that, for majority party plaintiffs such as Appellants, "a finding of unconstitutionality must be supported by evidence of *continued frustration of the will of a majority of the voters.*" *Id.* at 7a (quoting *Bandemer,* at 133) (emphasis added by the District Court). The District Court held that this showing is not made by a mere allegation of disproportionate representation, but rather requires some substantial permanency to the arrangement. *Id.* at 7a-8a, 11a (discussing the *Bandemer* plurality's rejection of the claim before it based on the absence of any evidence that the plaintiffs there had no hope of improving their fate in the next reapportionment).

Applying this requirement for a substantially permanent harm, the District Court found that Appellants "have not alleged that they have been shut out of the process or that the challenged congressional redistricting plan is one from which they cannot recover or substantially improve upon." [5]

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[5] Appellants misleadingly imply that the District Court, in evaluating whether they had been shut out of the political process as a whole, required Appellants to show interference with core party functions such as party registration, organizing, voting, fund-raising or campaigning. JS at 8-9.

Id. at 8a. The District Court held that, while Appellants "alleged disproportionality in abundance," they did not allege "the 'other indicia' which is required to show the discriminatory effect which *Bandemer* requires." *Id.* at 14a. Because "plaintiffs must set forth allegations which, if proven, justify court intervention into an essentially legislative process," and Appellants did not do so, the District Court held that Appellants had failed to state an actionable partisan gerrymandering claim under the Equal Protection Clause. *Id.* at 14a.

Appellants did not cure these fatal deficiencies in their Second Amended Complaint. *Id.* at 21a-22a. On the contrary, the District Court found that Appellants "concede[] that a political solution to their redistricting complaint is within reach by the next decade, or such other times as redistricting may lawfully occur at the direction of the state legislature." *Id.* at 21a.[6] Additionally, the District Court noted that Appellants similarly concede that Republican representatives "are likely to 'respond to constituent requests for assistance and will listen to constituents' expressions of views regardless of the party affiliation of the constituent involved.'" *Id.* at 22a (quoting Second Amended Complaint, ¶¶ 56-57). Thus, the District Court held that "the Second Amended Complaint, . . . , like its immediate predecessor, fails to state a claim under the Fourteenth Amendment to the United States Constitution upon which relief can be granted" and dismissed that complaint with prejudice. *Id.* at 21a-22a.

The District Court expressly rejected the notion that it was necessary for Appellants to make such showings. *Id.* at 10a-11a, n4.

[6] With respect to that last point, the District Court specifically noted that there is no state law that precludes redistricting from occurring before the next census. *Id.* at 21a, n1.

SUMMARY OF THE ARGUMENT

Appellants claim a direct appeal to this Court under 28 USC § 1253. Section 1253, however, only allows direct appeals from an "order granting or denying . . . injunctive relief." The June 5, 2002 order appealed herein does not grant or deny injunctive relief. Consequently, this Court lacks jurisdiction over this matter and the State Appellees respectfully request that this Court dismiss this appeal.

Alternatively, the State Appellees move this Court to summarily affirm the District Court decision. Appellants' partisan gerrymandering claim is facially and fatally deficient under *Davis v Bandemer,* 478 US 109 (1986). Appellants rely on the inadequate allegation that the 2001 Plan will deny Democrat voters proportional representation. In *Bandemer*, this Court rejected the proposition that the Equal Protection Clause entitles voters to proportional representation. *Bandemer,* 478 US at 132 (White, J., plurality); 478 US at 147, 158-60 (O' Connor, J., concurring). Appellants do not otherwise allege facts constituting an unconstitutional discriminatory effect and therefore failed to state a claim under the Equal Protection Clause.

Appellants' claims under *Shaw v Reno*, 509 US 630 (*Shaw I*) and art 1, § 4 are equally foreclosed. This Court should reject Appellants' invitation to apply *Shaw I* beyond the legal and factual historical foundation that compelled this Court to recognize a cause of action for racial gerrymandering that does not require a showing of actual vote dilution. Partisan gerrymandering does not cause the special harms posed by racial gerrymandering that prompted the *Shaw I* cause of action, and thus, that more lenient burden of proof is inapplicable to Appellants' claim. Similarly, Appellants urge this Court to apply art 1, § 4 in a manner that is unsupported by the language and history of that provision, as well as this Court's precedent. As this appeal is so insubstantial as to

require no further briefing or oral argument, summary affirmance is appropriate.

ARGUMENT

I. Appellants do not have a direct appeal to this Court from the District Court's decision granting summary disposition to the joint defendants, as that decision is not an order granting or denying injunctive relief. Thus, this Court does not have jurisdiction under 28 USC § 1253.

28 USC § 1253, under which Appellants assert this Court's jurisdiction, provides a direct appeal to this Court from "an order granting or denying, after notice and hearing, an interlocutory or permanent injunction" in actions required to be heard by three judge panels. The June 5, 2002 order appealed herein does not grant or deny injunctive relief; rather, this order dismisses Appellants' claim pursuant to Rule 12(b)(6) for failure to state a claim. As such, it cannot be directly appealed to this Court under § 1253.

In *Mitchell v Donovan*, 398 US 427 (1970), this Court held that § 1253 does not provide jurisdiction over appeals from orders that merely grant or deny declaratory judgment:

> Section 1253 by its terms grants this Court jurisdiction **only** of appeals from orders granting or denying injunctions. While there are similarities between injunctions and declaratory judgments, there are also important differences. . . .We have stressed that the three-judge-court legislation is not "a measure of broad social policy to be construed with great liberality," but is rather "an enactment technical in the strict sense of the term and to be applied as such." *Phillips v United States*, 312 US 246, 251. Thus this Court's jurisdiction under that

> legislation is to be literally construed. It would hardly be faithful to such a construction to read the statutory term "injunction" as meaning "declaratory judgment." [398 US at 430-431 (citations and footnotes omitted) (emphasis added)][7]

Relying on similar reasons, in *Goldstein v Cox,* 396 US 471 (1970), this Court dismissed an appeal from a denial of summary judgment that did not include a grant or denial of injunctive relief. The Court held that it was not sufficient that the plaintiffs had prayed for permanent and preliminary injunctive relief in their complaint and even nominally requested that relief in their motion for summary judgment, because "they took no practical step toward obtaining such relief" and the order denying the summary judgment motion did not include such relief. 396 US at 478-79.[8]

Like the *Goldstein* plaintiffs, while the Appellants here nominally sought injunctive relief in their complaint, they took no steps in pursuit of that relief. The only injunction entered below was the District Court's *sua sponte* decision to change Michigan's congressional filing deadline. Significantly, that May 15, 2002 order was not an injunction of the 2001 Plan and it was not appealed. *See Spannaus v Hodgson*, 420 US 903 (1975) ("It is of no consequence that a preliminary injunction was continued in effect until determination of this appeal, since no appeal was taken from that preliminary injunction.");

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[7] *See also, Carey v Wynn*, 439 US 8 (1978) (dismissing a § 1253 appeal for want of jurisdiction because, while granting declaratory relief in favor of the plaintiffs and acknowledging an entitlement to injunctive relief, the lower court did not grant such injunctive relief); *Gerstein v Coe,* 417 US 279 (1974) (same).

[8] *See also Gonzales v Automatic Employees Credit Union*, 419 US 90 (1974) (rejecting the argument that a summary judgment dismissal of a complaint that sought injunctive relief constituted a denial of injunctive relief such that a direct appeal would lie under § 1253).

Mitchell, supra, at 429 (no jurisdiction where no appeal was taken from the initial grant of injunctive relief).

Additionally, it is clear that the historical purpose for allowing direct appeals to this Court, i.e., limiting injury from improvidently granted injunctions of state law, is not served by allowing a direct appeal from this dismissal of Appellants' Second Amended Complaint for failure to state a claim.[9] It is equally clear that the congressional intent to narrowly confine this Court's mandatory appellate docket is harmed if § 1253 is extended to reach final, non-injunctive, orders such as June 5, 2002 order appealed here. *See, supra,* footnote 9.

Unlike the direct appeal from the Texas redistricting decision that this Court entertained in *White v Regester*, 412 US 755 (1973), the order appealed here does not contain any injunctive relief. It was only because the order in *White* contained both declaratory and injunctive relief that this Court held it had jurisdiction over that matter: "[A]lthough appellants could not have directly appealed to this Court the entry of a declaratory judgment unaccompanied by any injunctive relief, we conclude that we have jurisdiction of the entire appeal [because the Court below ordered both declaratory and injunctive relief]." *Id.* at 761 (citations omitted). Based on the foregoing, the State Appellees respectfully request this Court to dismiss this appeal for want of jurisdiction.

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[9] *See e.g., Goldstein, supra,* at 476-78 (discussing the historical purpose of direct appeal statutes and the canon of construction that requires § 1253 to be narrowly construed in order to serve Congress's intent that this Court's mandatory appellate docket be narrowly confined).

II. Appellants do not state an actionable partisan gerrymandering claim under the Equal Protection Clause and the District Court's dismissal of that claim should be summarily affirmed.

A. In *Bandemer* this Court rejected the notion that the Equal Protection Clause entitles voters to proportional representation. The District Court properly dismissed Appellant's partisan gerrymandering equal protection claim because it is, at core, an allegation of disproportionate representation.

The sum and substance of Appellants' partisan gerrymandering claim is their allegation that under the 2001 Plan Democrats likely will be elected to six or maybe five seats out of a congressional delegation of fifteen. Second Amended Complaint, ¶¶ 14, 50, 51;[10] JS App at 29a, 44a-46a. Such a result, they claim, would be inconsistent with their statewide vote totals,[11] thereby constituting an unconstitutional partisan gerrymander under the Equal Protection Clause. *Id.*

In *Bandemer*, however, a majority of this Court rejected the notion that voters or groups of voters are constitutionally entitled to proportional representation. 478 US at 132, 147, 158-60. Relying on the Court's rulings in *Whitcomb v Chavis*, 403 US 124, 153, 156, 160 (1971) and *White v Regester*,412 US 755, 765-766 (1973), the *Bandemer* plurality recognized that:

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[10] Appellants' Second Amended Complaint has two paragraphs numbered "51." JS App at 45a-46a. It is the second paragraph 51 that is cited here.

[11] Appellants claim that "Michigan is a politically competitive State" (Second Amended Complaint, ¶ 47, JS App at 43a), with "Michigan voters today lean[ing] somewhat Democratic in federal elections and slightly Republican in state elections." JS at 3.

> Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be. [*Id.*]

Disproportionate representation, the *Bandemer* plurality explained, "is inherent in winner-take-all, district-based elections, and we cannot hold that . . . a reapportionment law would violate the Equal Protection Clause because the voters in the losing party do not have representation in the legislature in proportion to the statewide vote received by their party candidates." *Id.* "[A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation does not constitute impermissible discrimination under the Equal Protection Clause." *Id.* at 132.

Justice O' Connor, writing a concurring opinion in which then-Chief Justice Burger and Justice Rehnquist joined, also rejected the notion that voters are entitled to proportional representation. *See* 478 US at 147, 158-60 (O' Connor, J., concurring). The concurring justices would have held that the Equal Protection Clause did not protect against partisan gerrymandering, which they believed to be a nonjusticiable political question. *Id.* at 144.

Because Appellants merely allege that Democrats will be unable to secure proportional representation, they have not alleged that the 2001 Plan has an unconstitutional discriminatory effect. Appellants' partisan gerrymandering claim is clearly foreclosed by *Bandemer* and the District Court properly dismissed it for failure to state a claim. No further

briefing or oral argument is necessary and summary affirmance is appropriate.

B. Appellants do not otherwise allege an actual discriminatory effect sufficient to state a claim of unconstitutional partisan gerrymandering.

While Appellants erroneously argue that the disproportionate results they predict render the 2001 Plan unconstitutional, they nominally attempt to allege secondary effects to satisfy the *Bandemer* plurality's requirement for "a substantially greater showing of adverse effect than a mere lack of proportional representation to support a finding of unconstitutional vote dilution." *Id.* at 131. Unconstitutional discrimination, the *Bandemer* plurality explained, "occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132.

Relying on this Court's racial gerrymandering decisions, the *Bandemer* plurality articulated the following threshold requirement for a partisan gerrymandering claim:

> In the individual multimember district cases, we have found equal protection violations only where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation. In those cases, the racial minorities asserting the successful equal protection claims had essentially been shut out of the political process. In the statewide political gerrymandering context, these prior cases lead to the analogous conclusion that equal protection violations may be found only

> where a history (actual or projected) of disproportionate results appears in conjunction with similar indicia. [*Id.* at 139-40 (internal citation and footnote omitted).]

Applying this standard, the District Court properly held that, while Appellants alleged disproportionate results, they did not allege "the 'other indicia' which is required to show the discriminatory effect which *Bandemer* requires." JS App at 14a. In its initial dismissal of this claim, the District Court specifically found that:

> Plaintiffs do not allege (1) that they have no chance of obtaining more favorable congressional districts in the next reapportionment; (2) that Republican candidates would be indifferent to the interests of Democratic citizens; or (3) that the challenged plan would result in Democrats being essentially 'shut out' of the political process; therefore, plaintiffs do not state a cognizable equal protection claim. Nor does the amended complaint contain allegations from which these consequences could be inferred. [JS App at 13a]

In its dismissal of Appellants' Second Amended Complaint, the District Court held that Appellants had not cured these fatal defects, specifically finding that Appellants continued to allege facts that precluded them from stating a cognizable claim. JS App at 21a-22a (finding that Appellants' own pleading reveals the possibility of a political solution and that Democrats' interests will not be entirely ignored).

Appellants do not contest the District Court findings. Instead, Appellants argue that the District Court misconstrued *Bandemer* and effectively overruled that decision. J.S. at 16-

17. Close examination of the District Court's opinion, however, reveals that the District Court properly applied the *Bandemer* plurality's intentionally rigorous standard. Moreover, as the *Bandemer* plurality recognized, a high threshold is an appropriate and necessary protection against embroiling federal courts in the States' inherent political and legislative redistricting function. *See,* 478 US at 133-34, 142-43. The District Court recognized and properly applied the high threshold set forth in *Bandemer.* JS App at 6a.

In an effort to avoid this high threshold, it is Appellants who offer a misconstruction of *Bandemer.* Appellants rely on a footnote that addresses the justiciability issue and proffer that as the authoritative standard for determining unconstitutional discriminatory effect. Specifically, quoting footnote nine of the plurality opinion, Appellants assert that *Bandemer* stands for the proposition that "redistricting should achieve 'a level of parity between votes and representation sufficient to ensure that significant minority votes are heard and that majorities are not consigned to minority status." JS at 14-15 (quoting *Bandemer* at 126 n9).

This quoted material from *Bandemer*, however, represents the Court's[12] rejection of the argument that the matter was not justiciable and did not purport to articulate the proofs necessary to demonstrate an unconstitutional discriminatory effect. While the Court acknowledged a preference for majorities not being consigned to minority status in this footnote, the Court did not articulate what effect would render a districting plan unconstitutional. The plurality, however, does provide that analysis in Part III of Justice White's opinion.

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[12] A majority of the Court joined in this part, Part II, of Justice White's opinion.

Specifically, in Part III of Justice White's opinion, the plurality explains that in determining whether a redistricting plan has an unconstitutional discriminatory effect "the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process." 478 US at 132-133. Because partisan gerrymandering claims present a "considerably more complex context" than one person, one vote claims, the plurality underscored that "it is also appropriate to require allegations and proof that the challenged legislative plan has had or will have effects that are sufficiently serious to require intervention by the federal courts in state reapportionment decisions." *Id.* at 134.

For an effect to be sufficiently serious to require such intervention, the plurality noted the Court has required both a history of disproportionate results and "strong indicia of lack of political power and the denial of fair representation." 478 US at 139-40. That strong indicia of unconstitutional discriminatory effect includes proof that the complaining voters have no hope of doing better in the next reapportionment and that their interests will be entirely ignored by the elected representatives. *Id.* at 132, 135-36, 139-40. The District Court correctly understood that Appellants were required to demonstrate these "other indicia" in order to show that the 2001 Plan's alleged detrimental impact has a "substantial permanency" that rises to a level of unconstitutional discriminatory effect. *See* JS App at 8a. Notwithstanding the Appellants' self-serving argument that these factors are impossible to demonstrate, the required showing of something more than "transitory results" (*Bandemer*, at 140) is the demanding threshold test the plurality articulated as necessary to demonstrate unconstitutionality and to avoid the judiciary usurping the political and legislative redistricting function.

As Appellants' attack on the legislative process and state redistricting criteria reveals, in place of that self-

avowedly demanding standard articulated by the *Bandemer* plurality, Appellants would have this Court adopt an analysis akin to that suggested by Justice Powell in his dissent. That dissenting analysis, however, was rejected by this Court.

Moreover, by advocating that unconstitutionality be determined by a sole requirement for a rough proportionality between votes and seats regardless of a party's ability to otherwise influence the political process and control future redistricting efforts,[13] Appellants proffer a standard that represents exactly what Justice O' Connor predicted would be the calamitous result of treating partisan gerrymandering claims as justiciable. 478 US at 155. Justice O' Connor, then-Chief Justice Burger and Justice Rehnquist joining, cautioned that courts would be pressured "toward some form of rough proportional representation" that is inconsistent "with our history, our traditions, [and] our political institutions." *Id.* at 145. The District Court's rejection of Appellants' standard, therefore, is not a misconstruction of *Bandemer*; on the contrary, the District Court opinion faithfully followed the *Bandemer* plurality opinion and, in so doing, avoided the constitutionally objectionable result that Justice O' Connor cautioned against.

In sum, Appellants urge this Court to adopt an equal protection standard that demands proportional representation, a concept that this Court rejected in *Bandemer*. No further briefing or oral argument is necessary in order for this Court to reject that argument.

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[13] Appellants, with no textual support, assert that "under *Bandemer*, a State violates the Equal Protection Clause when, as here, it consigns a political party to one-third or less of the congressional seats, even if that party consistently wins a majority of the popular vote statewide." JS at 20.

III. Appellants' argument that this Court should extend the lower standard for racial gerrymandering claims articulated in *Shaw I* to partisan gerrymandering claims disconnects that ruling from its legal and factual foundation and was properly rejected by the District Court.

Appellants claim that the racial gerrymandering standard articulated in *Shaw I* and in *Miller v Johnson,* 515 US 900 (1995), should also govern partisan gerrymandering claims, arguing that "[t]his Court, having interpreted the Fourteenth Amendment as requiring strict scrutiny of districts drawn predominantly on the basis of voters' race, should take the next step and recognize that districts drawn predominantly on the basis of voters' political viewpoint are also constitutionally suspect." JS at 24. This argument divorces *Shaw I* and *Miller* from the factual and legal foundation upon which the Court relied to recognize a racial gerrymandering claim that did not require a showing of actual vote dilution. Moreover, as the District Court properly recognized (JS App at 13a-14a, n5), Appellants' assertion that *Shaw I* and *Miller* should be extended to partisan gerrymandering claims is directly contrary to this Court's longstanding recognition that redistricting is an inherently political enterprise. *See e.g., Gaffney v Cummings*, 412 US 735, 752-53 (1973) ("Politics and political considerations are inseparable from districting and apportionment.")

In *Shaw I*, this Court recognized a distinct cause of action for racial gerrymandering that does not rely on actual vote dilution, but rather arises from the fact that "[c]lassifying citizens by race . . . threatens special harms that are not present in our vote-dilution cases. It therefore warrants different analysis." *Id.* at 649-50. In *Miller, supra,* this Court clarified

that to make out that type of racial gerrymandering claim a plaintiff must prove:

> that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. [515 US at 916]

Contrary to the Court's conclusion in *Shaw I* and *Miller* that the Equal Protection Clause may be violated when racial considerations motivate the districting process even when there is no actual vote dilution, the *Bandemer* plurality expressly rejected the parallel conclusion with respect to the consideration of partisan concerns in drawing district lines. *Bandemer, supra,* at 138-39. Specifically, the *Bandemer* plurality rejected Justice Powell's conclusion that, in some instances, "the intentional drawing of district boundaries for partisan ends and for no other reason violates the Equal Protection Clause in and of itself." *Id.*

The basis for these divergent standards for racial and partisan gerrymandering was thoroughly explained by the Court in *Shaw I* and *Miller*: our Nation's long and regrettable history of racial discrimination in voting. *See Shaw I, supra,* at 639-641 (discussing that history and explaining that "it is against this backdrop that we confront the questions presented here."); *Miller, supra,* at 904 (explaining that "our Nation's constitutional and demographic history" is the reason that racial classifications are subjected to "the most exacting of judicial scrutiny.") It is that history the Court cited in *Shaw I*

when it rejected the assertion that "a racial gerrymander of the sort alleged here is functionally equivalent to gerrymanders for nonracial purposes, such as political gerrymanders." *Shaw I,* at 650. As the Court explained in *Shaw I*:

> our country's long and persistent history of racial discrimination in voting – as well as our Fourteenth Amendment jurisprudence, which has always reserved the strictest scrutiny for discrimination on the basis of race – would seem to compel the conclusion that racial and political gerrymandering claims are not subject to precisely the same constitutional scrutiny. [*Id.* at 650.]

Because of that historical context, *Shaw I* explained, the use of impermissible racial stereotypes in racial gerrymandering causes special harms:

> [R]eapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways [than just vote dilution.] It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole. [*Id.* at 650.]

The impermissible racial stereotype implicit in such districting plans is "the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* at 647. In contrast, voters affiliate with a political party as a matter of choice because they, in fact, do "think alike, share the same political interests, and will prefer the same candidates at the polls." Thus, consideration of political affiliation does not

impermissibly stereotype voters based on a wrongful, and certainly not historically injurious, perception regarding their political views.

Racial classifications "threaten[] to carry us further from the goal of a political system in which race no longer matters." *Id.* at 657. The historical underpinnings of *Shaw I,* and the special harms posed by that history, are quite simply not present in the partisan gerrymandering claim context. This Court has held that "a racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Shaw I, supra,* at 643-44 (quoting *Personnel Administrator of Mass v Feeney*, 442 US 256, 272 (1979)). Juxtaposed against that holding is the Court's express and repeated recognition that redistricting is inherently a political endeavor and that protecting partisan interests by drawing district lines based on political affiliation is constitutionally legitimate. *See e.g., Hunt v Cromartie*, 532 US 234, 243 (2001) ("*Hunt II*") (recognizing political affiliation as a legitimate factor to consider when drawing district lines and holding that when politics, not race, predominates the redistricting process plaintiffs have not proven unconstitutional racial gerrymandering); *Hunt v Cromartie*, 526 US 541, 551 (1999) ("*Hunt I*") ("our prior decisions have made clear that a jurisdiction may engage in constitutional political party gerrymandering"); *Bush v Vera*, 517 US 952, 968 (1996) (recognizing that consideration of political affiliation is constitutionally legitimate).

As the *Bandemer* plurality noted, adopting a low threshold for partisan gerrymandering claims, as Appellants urge this Court to do in their *Shaw I* claim, "would invite attack on all or almost all reapportionment statutes." 478 US at 133. The *Bandemer* plurality cautioned that:

> Inviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from the legislative halls. We decline to take a major step toward that end, which would be at odds with our history and experience. [*Id.* at 133-143]

In urging this Court to apply the *Shaw I* and *Miller* racial gerrymandering standard to partisan gerrymandering claims Appellants ask this Court to remove the political task of redistricting from state legislatures and place it in the courts. The District Court properly declined to take that step and rejected Appellants' attempt to divorce *Shaw I* and *Miller* from their legal and factual foundation by applying those decisions to partisan gerrymandering claims. No further briefing or oral argument is necessary in order for this Court to summarily affirm that decision.

IV. Appellants do not state a cognizable art 1, § 4 claim.

Appellants assert that the "Elections Clause," US Const art 1, § 4, "fundamentally limits a state legislature's power to gerrymander congressional districts." JS at 24-30. Despite a total absence of textual support from the language of art 1, § 4, Appellants attempt to rely on *US Term Limits v Thornton*, 514 US 779 (1995) and *Cook v Gralike*, 531 US 510 (2001), to argue that the Framers' mistrust of state legislatures motivated them to adopt art 1, § 4 as a limitation on states' congressional redistricting authority. Appellants' selective quotation of *US Term Limits* and historical documents, however, fundamentally distorts that decision as well as art 1, § 4's purpose. As this Court recognized in *US Term Limits*, art 1, § 4 does not even require a state to hold district-based congressional elections

and, at the time the Constitution was being ratified, at-large elections were, in fact, common. 514 US at 832-33 (quoting James Madison's statements that art 1, § 4 grants the states the power to hold either district or at-large elections); *Id.* at 904 (J. Thomas, dissenting) (noting the early prevalence of at-large elections). Because art 1, § 4 does not require congressional districting, Appellants fundamentally misconstrue art 1, § 4 by arguing that it substantively limits **how** states must redistrict their congressional seats.[14]

US Term Limits is first and foremost a decision regarding the Qualification Clauses. In *US Term Limits* this Court held that the Qualification Clauses (art 1, § 2, cl 2 & art 1, § 3, cl 3) exclusively fix the qualifications for the United States Senate and House of Representatives and that state-imposed term limits violate those provisions. *Id.* at 800-01, 827. The *US Term Limits* defendants unsuccessfully argued that term limits are not a qualification but rather represent the state's reasonable exercise of its "time, place and manner" authority under art 1, § 4. *Id.* at 828, 832. Appellants attempt to rely on this Court's rejection of that argument to support their art 1, § 4 claim.[15] Significantly, and contrary to

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[14] Congress now requires States to enact single-member districting plans. 2 USC § 2c.

[15] Notably, in rejecting the proposition that term limits could properly be conceived as a "time, place, manner" procedural regulation under art 1, § 4, *US Term Limits* held that a necessary consequence of that argument would be that "Congress itself would have the power to 'make or alter' a measure such as [the term limits law before the Court.]" *Id.* at 832. Appellants' assertion that art 1, § 4 substantively limits states' congressional redistricting authority similarly would necessarily dictate congressional, and not judicial, review of challenges to congressional redistricting plans. The extensive caselaw reviewing congressional redistricting plans under the Equal Protection Clause, however, belies any such contention. Moreover, as *US Term Limits* held, just as the Framers were concerned that allowing "Congress to set its own qualifications would lead inevitably to congressional self-aggrandizement and the upsetting of the delicate

Appellants' construction of art 1, § 4 as a limitation on power, *US Term Limits* recognized that the history of art 1, § 4 demonstrates that "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations." *Id.* at 833 (emphasis added). In that decision this Court simply held that art 1, § 4 cannot grant authority to the states to set qualifications for federal offices when other, more specific, provisions of the Constitution (i.e., the Qualification Clauses) deny the states that power. *Id.* at 829 (stating that "[a]s we have often noted, 'constitutional rights would be of little value if they could be . . . indirectly denied.'") (ellipsis in *US Term Limits*).

Thus, while *US Term Limits'* discussion of art 1, § 4 is best understood as respecting this most fundamental principle of constitutional construction, Appellants urge this Court to read that decision as supporting a sweeping construction of art 1, § 4 that has no historical or textual support. Appellants ask this Court to read into art 1, § 4 a limitation on States that requires them to strive for "absolute neutrality" when enacting congressional redistricting plans. JS at 29. Not only is there nothing in *US Term Limits* to support such a broad reading, that interpretation of art 1, § 4 directly conflicts with this Court's decisions that have repeatedly recognized the inherently political nature of redistricting and upheld partisan concerns as constitutionally legitimate factors. *See e.g., Hunt II, supra,* at 243; *Hunt I, supra,* at 551.

Plaintiffs' reliance on *Cook, supra,* is similarly misplaced. In *Cook*, this Court held that a ballot label indicating a congressional candidate's support or non-support for term limits was not a valid exercise of the state's art 1, § 4 time, place, and manner regulation of elections. *Id.* at 523-26. Such a label is not a procedural regulation and is thus not

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constitutional balance," (*Id.* at 832), allowing Congress to have ultimate control over the redistricting process could lead to similar grave injuries.

authorized by art 1, § 4. *Id.* at 525-26. Like *US Term Limits*, nothing in *Cook* supports the proposition that art 1, § 4 imposes substantive limitations on congressional redistricting.

In *US Term Limits* and *Cook,* this Court was called upon to evaluate the scope of art 1, § 4's grant of regulatory power. When this Court has been asked to evaluate the limits of that power, *i.e.*, to answer whether an election law unconstitutionally infringes the right to vote, it has done so under the auspices of the First and Fourteenth Amendments. *See, eg, Anderson v Celebrezze*, 460 US 780, 788 (1983); *Burdick v Takushi*, 504 US 428, 441 (1992). In *Bandemer*, this Court undertook just such an analysis. It is the Equal Protection Clause that limits states' congressional redistricting, not art 1, § 4. Appellants do not point to anything within *Bandemer* that supports limiting its equal protection analyses to state legislative redistricting challenges or that indicates that art 1, § 4 plays any role in that analysis. Appellants have provided this Court no basis to depart from its established jurisprudence of applying equal protection analyses to claims alleging infringement on voting rights. The District Court properly dismissed Appellants' unsupported art 1, § 4 claim and no further briefing or oral argument is required for this Court to summarily affirm that decision.

CONCLUSION

The Court should dismiss this appeal or summarily affirm the District Court decision.

Respectfully submitted,

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Dated: September, 2002